IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 16-0745

Zirkelbach Construction, Inc.)
)
Plaintiff – Appellant,)
)
v.)
)
DOWL, LLC dba DOWL HKM,)
)
Defendant – Appellee.)

On Appeal from the District Court of the Thirteenth Judicial District
of the State of Montana in and for the County of Yellowstone
District Court Cause No. DV 14-1061

APPELLANT'S REPLY BRIEF

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Appellant Zirkelbach submits this Brief in Reply to DOWL's Appellee's Brief in this matter. DOWL has failed to show how a blanket limit of liability clause providing for only nominal damages does not run afoul of Montana's general prohibition on exculpatory clauses, and has failed to effectively rebut Zirkelbach's arguments regarding the effect of the addendums, amendments, and attendant emails to modify the clause in question.

ARGUMENT

I. Public policy and Montana statute disfavor what is effectively an exculpatory clause.

Here, DOWL has attempted to effectively contract around liability for its own negligence, fixing its liability at $50,000.00, which represents less than 1/13th of their billed professional fees of approximately $665,000.00, and less than 1/24th of the $1,218,197.93 that Zirkelbach actually spent fixing problems it alleges were caused by DOWL's professional negligence. In their brief, DOWL has failed to overcome Montana's general disfavor of exculpatory clauses, and has failed to cite any case law from any jurisdiction which would support a nominal blanket limit of liability clause as is at issue. Convincing public policy arguments combined with Montana's disfavor of exculpatory clauses gives this Court ample justification to find the clause as written invalid.

A. Montana law does not support clauses which effectively eliminate a party's responsibility for its own negligence.

Where, as here, the blanket limit of liability clause is so nominal that it acts as an exculpatory clause, it is clearly disfavored under Montana law.

Montana law clearly disfavors contracts that attempt to insulate parties from the effect of their own misfeasance. As stated in § 28-2-702, MCA:

> All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of law.

Importantly, the statute states that it doesn't matter whether the object is "directly or indirectly" to exempt the party from the product of its own negligence, the contract will be "against the policy of law."

The general rule remains that "a person may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid." *Haynes v. County of Missoula*, 163 Mont. 270, 279, 517 P.2d 370, 376 (1973). Montana law disfavors agreements which attempt to "contract against the effect of their own negligence," or to exempt [the entity] from responsibility. *Id.* "An entity cannot contractually exculpate itself from liability for willful or negligent violation of legal duties, whether they be rooted in statutes or case law." *Miller v. Fallon County*, 222 Mont. 214, 221, 721 P.2d 342, 346 (1986).

Montana law strongly disfavors contracts which seek to exculpate a party from liability for its own negligence. In this action, DOWL has been noticeably silent in rebutting the claims that it was, in fact, negligent, choosing instead to

seek refuge in a contract provision which would, if enforced, effectively exculpate DOWL from liability in a case where they realized $665,000 in professional fees and allegedly caused over $1.2 million in damages. Limiting their liability to $50,000.00, in this case a nominal amount and certainly less than the legal fees and costs necessary to prosecute Zirkelbach's claim, would absolutely function as an exculpatory clause repugnant to public policy, precedent, and statute. Affirming the viability of nominal limit of liability clauses when they are *de facto* exculpatory clauses would set terrible precedent and lead to dire consequences for contracting parties in Montana.

B. The case law cited by DOWL in support of the validity of their clause does not, in fact, support their position.

While DOWL, claims, incorrectly, that "enforcement of the Limitation of Liability Clause comports with the overwhelming trend," an accurate reading of the cases indicates that Limitation of Liability clauses similar to the one found here have only been enforced when there were adequate limits that served to incentivize competent work. Further, all of the other cases cited by DOWL are for situations involving loss that is not analogous, in that none of them are cases where the party is limiting liability for concrete monetary damages directly attributable to that party's failures.

C. Every reasonably analogous case that DOWL cites supporting its position on the validity of limitation of liability cases involves a limit that tracks with the professional fee.

DOWL incorrectly states that most jurisdictions who have addressed the issue "reject arguments that limitations ***similar to, or less than, the amount in the agreement are 'too nominal' to be enforced***," and goes include a footnote citing "15 courts that specifically enforce limitation of liability clauses in construction or design contexts." Directly contradicting DOWL's statement, each and every one of the cases they have cited deals with a clause that sets the limit of liability at the greater of some sum of money ***or*** the professional's fee. A small sampling of the specific language thoroughly rebuts DOWL's contention.

In *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 196 P.3d 222, 223, 219 Ariz. 200, 201, 542 Ariz. Adv. Rep. 11 (Ariz. 2008)(emph. added), the clause in question provides that "the liability of WLB, its agents and employees . . . is limited to the ***total fees actually paid by the Client to WLB for services rendered by WLB hereunder***.". The court reasons that "a limitation of liability provision could cap the potential recovery at a dollar amount so low as to effectively eliminate the incentive to take precautions." *Id*. at 225. The court ultimately holds that in this case, where the party "stands to lose the very thing that induced it to enter into the contract," the cap is valid because it "caps it by an amount that substantially preserves WLB's interest in exercising due care." *Id*. (see also *Marbor, Inc. v. Borough of Tinton Falls*, 297 N.J. Super. 411, 688 A.2d 159, 162-63 (N.J. Super.

Ct. Law Div. 1996), cap on liability equal to fees earned "provided adequate incentive to perform.")

In a Mississippi federal case, the court addressed a clause that held that "THE TOTAL AGGREGATE LIABILITY OF THE CONSULTANT. . . TO CLIENT AND THIRD PARTIES GRANTED RELIANCE IS LIMITED ***TO THE GREATER OF $50,000 OR ITS FEE***. . ." *Thrash Commer. Contrs., Inc. v. Terracon Consultants, Inc.*, 889 F. Supp. 2d 868, 872 (S.D.Miss. 2012)(emph. added). *Thrash* clearly notes that "[c]ourts considering the issue have consistently held that a limitation of liability will be found unenforceable if it establishes a limitation of liability that 'is so minimal compared to [a party's] expected compensation as to negate or drastically minimize [such party's] concern for the consequences of a breach of its contractual obligations.'" *Id*. at 875-76 (citing *Valhal Corp v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3rd Cir. 1995)). In this case, the court finds that imposition of a $50,000 limit is, in fact, permissible in light of the fact the fee was only $14,900. *Thrash*, 889 F. Supp. 2d 868, 876.

Valhal Corp. v. Sullivan Assocs., Inc., also cited by DOWL as "reject[ing] arguments that limitations similar to, or less than, the amount in the Agreement are too nominal," in fact says quite the opposite. The Pennsylvania court expresses agreement with the argument that "exculpatory clauses, indemnity clauses and limitation of liability clauses differ only in form as the effect of each is to limit

one's liability for one's own negligence," *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 202 (3d. Cir. Pa. 1995). The clause in the contract at issue in *Valhal* states that "the total aggregate liability of each Design Professional ***shall not exceed $50,000 or the Design Professional's total fee for services rendered on this project***." *Id*. at 198 (emph. added). While the court finds the clause valid, it notes that "[t]he inquiry must be whether the cap is so minimal compared to Sullivan's expected compensation as to negate or drastically minimize Sullivan's concern for the consequences of a breach of its contractual obligations." *Id*. at 204.

Each and every one of the relevant and comparable cases cited by DOWL as evidence that courts generally allow limitation of liability in similar construction contracts in fact says that the party cannot limit its liability to a nominal amount less than its professional fee.[1] The clear and consistent logic

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[1] See e.g. *W. William Graham, Inc. v. City of Cave City*, 709 S.W.2d 94, 95 (Ark. 1986) ("LIMITED TO THE GREATER OF $50,000 OR ITS FEE."); *Markbourogh Cal.v. Superior Court*, 277 Cal. Rptr. 919, 921 (Cal.App. 4th Dist. 1991) ("limitation of liability clause limiting Glenn's liability to the greater of $50,000 or Glenn's consulting fee."); *RHA Contr., Inc. v. Scott Eng'g, Inc.*, 2013 Del. Super. LEXIS 301, 2013 WL 3884937 (Del. Super. Ct. July 24, 2013) ("[C]lause entitled 'Risk Allocation' which specifically limits SEI's liability on the contract to the total fees paid."); *RSN Props. v. Eng'g Consulting Servs.*, 301 Ga. App. 52, 52-53, 686 S.E.2d 853, 854 (Ga. Ct. App. 2009) ("the total aggregate liability of ECS to [RSN] shall not exceed $50,000 or the value of services rendered, whichever is greater."); *SAMS Hotel Group, LLC v. Environs, Inc.*, 716 F.3d 432, 433 (7th Cir. Ind. 2013) ("Environs Architects/Planners, Inc. total liability to the Owner shall not exceed the amount of the total lump sum fee due to negligence, errors, omissions, strict liability, breach of contract or breach of warranty."); *Marbro, Inc. v. Bourough of Tinton Falls*, 297 N.J. Super. 411, 418,

behind each of these decisions is that, at a minimum, the contracting party should bear responsibility at least to the point where it stands to gain from their contractual agreement. Failing this, the limit of liability is simply too nominal to provide any incentive for competent work.

i. Every other case cited by DOWL involves a circumstance where damages are consequential or in the nature of insurance damages.

The other, non-construction related cases that are cited by DOWL to argue for the legitimacy of their limit of liability are so dissimilar that they can have no bearing on the Court's inquiry into the validity of the clause. They can be divided generally into two types of cases; those where the damages are due to phone directory omissions, and cannot be firmly fixed or attributed solely to the

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688 A.2d 159, 162 (Law Div. 1996) ("If it is determined that FRA acted in a negligent manner, the firm may be held liable up to $32,500. This figure represents FRA's total fee for services rendered. . ."); *Fort Knox Self Storage, Inc. v. W. Techs., Inc.*, 140 N.M. 233 235 (N.M. Ct. App. 2006) ("TOTAL AGGREGATE LIABILITY. . . SHALL BE STRICTLY LIMITED TO AN AMOUNT EQUAL TO THE GREATER OF $50,000 OR THE TOTAL CONTRACT PRICE PAID. . ."); *Soja v. Keystone Trozze, LLC*, 106 A.D.3d 1168, 1169, 964 N.Y.S.2d 731, 732 (N.Y. App. Div. 3d. Dep't 2013) ("the total aggregate liability of [Keystone] . . . shall not exceed [its] total fee for services rendered on this project."); *Blaylock Grading Co., LLP v. Smith*, 658 S.E.2d 680, 681, 189 N.C. App. 508, 509 (N.C. Ct. App. 2008) ("[Defendants' liability to plaintiff] for any and all injuries . . . shall not exceed the total amount of $50,000, the amount of [defendant's] fee (whichever is greater) or other amount agreed upon when added under Special Conditions."); *Kelly v. Heron*, 16 Fed. Appx. 695, 698 (9th Cir. Wash. 2001) ("AGRA must pay 'for any injury or loss on account of any error, omission or other professional negligence" to $50,000 or AGRA's fee, whichever is greater.").

directory publisher, and "alarm system" cases, where the plaintiff effectively asks the courts to make the faulty system provider pay insurance-like damages. In each of these cases, the courts addressing the issues provide clear rationale for affirming limitation of liability clauses that have no application in the instant case.

The Montana case *Mountain States Tel. & Tel. Co v. District Court*160 Mont. 443, 503 P.2d 526, (1972), cited to repeatedly by DOWL, proves to be a perfect example of a telephone directory case. In *Mountain States*, the Court looks at and approves of a clause limiting damage to "a refund not exceeding the amount of the charges for such of the subscriber's service as is affected during the period covered by the directory in which the error or omission occurs," and excluding lost profits. The Court reasoned that excluding lost profits was reasonable, because:

> "Even if decreased business or sales can be shown by a business whose listing has been omitted, the problem of causation when the offended subscriber is a business enterprise would be a problem for courts. Businesses suffer fluctuations from year to year, mostly unexplained, making the determination of damage a complex problem."

Id. at 446.

The instant case offers no such problem with "squishy" damages and problems of causation. Here, Zirkelbach has alleged that DOWL failed to perform its job of translating the FedEx specs to usable plans, requiring $1, 218,197.93 in remedial work. Here, should Zirkelbach prove its allegations, the damages are not

questionable, but rather calculable to the penny. Limitations on liability such as those found in the telephone directory cases which deal in consequential damages are simply not applicable to this Court's inquiry into the validity of a limitation on liability for the consequences of DOWL's own negligence.

The other primary type of case cited by DOWL deals with the liability of a security alarm company is typified by *Saia Food Distribs. & Club, Inc. v. SecurityLink from Ameritech, Inc.*, 902 So. 2d 46, 50 (Ala. 2004). In this case, the court is asked to evaluate a provision in the alarm system company's contract that limits liability "to fifty percent of one year's recurring service charge or the amount of $1000.00, whichever is less, or solely with respect to a DIRECT SALE transaction, to an amount equal to the purchase price of the equipment." *Id*. at 50. The court finds the limit is valid, extensively citing to 37 A.L.R. 4th 47, 89-97 (1985), which states in part that:

> "The rationale for upholding an agreement between the purchaser and the manufacturer of an alarm system to limit the liability of the manufacturer is that most persons . . . carry insurance for loss due to various types of crimes. Presumptively insurance policies who issue such policies base their premiums on their assessment of the value of the property and the vulnerability of the premises. No reasonable person could expect that the provider of an alarm service would, for a fee unrelated to the value of the property, undertake to provide an identical type coverage should the alarm fail to prevent the crime."

Id. at 53.

Finding this rationale persuasive, the court in *Saia Food* goes on to state that "an installer of security equipment or a supplier of fire- or security-monitoring services does not become an insurer of the property it is designed to help safeguard." *Id.* at 54. The court notes that imposing these responsibilities "would render such a contract cost prohibitive." *Id.*

In the instant case, Zirkelbach is not asking DOWL to become a pseudo-insurer of its property. Zirkelbach is instead claiming definitive damages for work that needed correction due to the failure of DOWL to perform its work professionally. Zirkelbach is not asking DOWL to "insure" a loss unrelated to its performance, and these "alarm" cases are not applicable to the situation now at issue.

Even the cases involving telephonic directories and alarm systems, the limited liability is tied to the amount paid to the negligent parties. DOWL's reliance on these non-analogous cases is misplaced.

ii. No cases cited by DOWL support their position that damages can be limited to a nominal value far less than the professional fee.

DOWL has failed to demonstrate that any jurisdictions have consistently ruled that limitation-of-liability cases, particularly those which insulate a party from its own negligence to nominal sums, to be universally validated. Rather, the cases cited by both Zirkelbach and DOWL clearly show that the only instances

where limitation-of-liability provisions are consistently upheld are those in which the party seeking limitation has at least their fees at stake.

Failing to recognize this essential element of the other jurisdictions' holdings would lead to an absurd precedent. Companies, particularly professional services companies which trade on the competence of their professional services, would be free to write in nominal limit-of-liability provisions and then proceed to do sloppy work (or indeed, no work at all) without any practical consequence. This Court should not affirm this limit-of-liability clause as nominal and against public policy because it clearly did nothing to incentivize competent performance by DOWL.

II. When taken as a whole with addenda and amendments, the contract has internal conflicts and ambiguity which must be construed against DOWL's limit of liability clause.

When this contract and all of its provisions, addenda, and amendments is carefully examined, it remains unclear that the parties understood and agreed to a $50,000 limit of liability. This issue was clearly raised by the District Court in its Memorandum and Order Granting Defendant's Motion for Partial Summary Judgment. (Dkt. 233, pp. 10-11). As laid out in Appellant's Opening Brief, there is evidence in the form of the addendum and the emails to the agreement which indicates that the purported limit-of-liability and the clauses contained in the addenda exist in tension.

When the various insurance and liability provisions in the various documents that make up the whole contract are in conflict, it is the Court's place to "give effect to the mututal indentation of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (see e.g. § 28-3-301, MCA; *Mary J. Baker Revocable Trust*, 2007 MT 159, ¶ 21). When the contents of the Agreement, the addenda, and the email from Zirkelbach's representative Pastor are taken together, it is clear that the parties reached some agreement that there was to be at least $1,000,000 in Professional Liability, contradicting the original Agreement's purported $50,000 limit on liability.

CONCLUSION

Montana law's general disfavor of clauses which seek to shield a party from the effects of their own negligence and DOWL's nominal potential exposure in this matter clearly support a finding by this Court that the liability limit set in the Agreement is void as being against public policy. No other jurisdictions support blanket limits on liability in similar professional negligence cases, instead only showing favor to clauses which at least peg the potential liability of the party seeking to limit it to the sum of their professional fees. Here, where the professional fees eventually grew to $665,000, a limit to less than a 13^{th} of the professional fees is clearly nominal, and serves as a *de facto* exculpatory clause.

The Court should also find that the contract is internally ambiguous. Analysis of the various contract and related documents clearly shows that the contracting parties had different conclusions regarding the effect of the limit-of-liability clause and that there is a mistake or imperfection in the writing.

For the above reasons, this Court should declare the limit-of liability clause present in DOWL's agreement void as written, and remand this action to the District Court for further proceedings to determine DOWL's liability to Zirkelbach.

DATED this 7th day of April, 2017

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

/s/ W. Scott Green
By: W. Scott Green, *Attorneys for Appellant*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that Appellant's Reply Brief is printed with a proportionally spaced Time New Roman text typeface of 14 points, is double spaced; and the word count is calculated by Microsoft Word 2003, is not more than 5000 words, excluding the certificate of service and certificate of compliance.

/s/ W. Scott Green
W. Scott Green, Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following parties by the means designated below, this 7th day of April, 2017.

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